SUPREME COURT U. S.
APR 21 1958
JOHN T. FEY, Clerk

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 53

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

vs.

JOSEPH C. O'NEILL,

Respondent.

PETITION FOR CERTIORARI TO THE SUPREME COURT OF FLORIDA

RICHARD W. ERVIN
Attorney General
The Capitol
Tallahassee, Florida

REEVES BOWEN
Assistant Attorney General
The Capitol
Tallahassee, Florida

FRANK S. HOGAN
District Attorney
New York County
155 Leonard Street
New York 13, N. Y.
Counsel for Petitioner

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PETITION FOR CERTIORARI TO THE SUPREME COURT OF FLORIDA

Comes now the petitioner, The People of the State of New York, and respectfully petitions this Court to issue a writ of certiorari to review the hereinafter mentioned decision of the Supreme Court of Florida, entered on January 22, 1958.

OPINIONS OF THE COURTS BELOW

The opinion of the Circuit Court of Dade County, Florida, was delivered on July 20, 1956 and is reported in 9 Florida Supplement 153-164. A copy thereof is appended hereto as Appendix "A."

The opinion of the Supreme Court of Florida was de-

livered on January 22, 1958 (R. 141-154), and it is reported in 100 So. 2d 149-157 (Advance). A copy thereof is appended hereto as Appendix "B."

JURISDICTION

The judgment sought to be reviewed is dated January 22, 1958, and was entered on said date (R. 155). A copy thereof is appended hereto as Appendix "C."

Said judgment became final on February 24, 1958, when the Supreme Court of Florida entered its order (R. 164) denying the petition for rehearing (R. 156-163) which was timely filed by the petitioner on February 4, 1958.

It is believed by the petitioner that Section 1257(3) of Title 28, U. S. Code, confers on this Court jurisdiction to review the judgment in question by writ of certiorari.

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are as follows:

QUESTION ONE

Is Section 942.02, Florida Statutes 1955, being a part of the "uniform law to secure the attendance of witnesses from within or without a state in criminal proceedings," unconstitutional because of conflict with the privileges and immunities clause of Section Two of Article IV of the Constitution of The United States or with the privileges and immunities clause of the Fourteenth Amendment to said Constitution, or with both of said privileges and immunities clauses, insofar as said Statute authorizes a judge of a Court of Record in Florida to order that a witness in Florida be taken in cus-

tody and delivered to an officer of a requesting state for the purpose of procuring such witness' testimony in a criminal prosecution or Grand Jury investigation in a court of the requesting state, where such requesting state has also enacted a similar reciprocal law?

QUESTION TWO

Is Section 942.02, Florida Statutes 1955, being a part of the "Uniform Law to secure the attendance of witnesses from within or without a state in criminal proceedings," unconstitutional because of conflict with the privileges and immunities clause of Section Two of Article IV of the Constitution of the United States or with the privileges and immunities clause of the Fourteenth Amendment to said Constitution, or with both of said privileges and immunities clauses, insofar as it authorizes the judge of a court of record in Florida to issue a summons to a witness in Florida directing him to attend and testify in a court of a requesting state in a criminal prosecution or grand jury investigation, where such requesting state has also enacted a similar reciprocal law?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutibnal provisions which this case involves are the privileges and immunities clause of Section Two of Article IV, Constitution of the United States, reading as follows:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

and the privileges and immunities clause of the Fourteenth

Amendment to the Constitution of the United States, readings as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States * * *"

The statute which this case involves is Section 942.02, Florida Statutes 1955, which, along with Sections 942.01 and 942.03-942.06, Florida Statutes 1955, make up the "Uniform law to secure the attendance of witnesses from within or without a state in criminal proceedings." Said statutes are found in Volume 2, Florida Statutes 1955, at pages 2927-2928. Since said Section 942.02 is lengthy, it is not copied in this petition at this point but is set forth in the appendix hereto. Also, in order that all of said uniform law may readily be examined by the Court, the other above mentioned Sections thereof are also copied into the Appendix. (Appendix "D")

STATEMENT OF THE CASE

In 1936 New York enacted the uniform law to secure the attendance of witnesses from within or without a state in criminal proceedings and the same may be found as Section 618-a of the New York Code of Criminal Procedure.

In 1941, Florida adopted said uniform law and it later became Sections 941.01-941.06, Florida Statutes 1955, which are copied into the Appendix hereto. (Appendix "D").

On April 23, 1956, there was filed in the Circuit Court of Dade County, Florida, a certificate executed pursuant to the requirements of said uniform law by Honorable Mitchell D. Schweitzer, one of the judges of the Court of General

Sessions, County of New York, State of New York (R. 1-6), seeking to require the attendance of the respondent, Joseph C. O'Neill, as a witness before a New York grand jury, the said respondent being a resident of the State of Illinois but being present in the State of Florida. Appended to said certificate was the affidavit upon which it was based, said affidavit having been executed by New York Assistant District Attorney Francis X. Clark (R. 7-11).

Said certificate recommended that the respondent be taken into immediate custody and delivered to an officer of the State of New York to assure his attendance in New York (R. 4).

An attachment for the respondent, requiring his production before said Circuit Court to show cause, was issued on April 23, 1956 (R. 13-14). He was ordered released on bond (R. 16) and he made the required bond (R. 17).

On May 28, 1956, the respondent filed his response and motion to quash said rule to show cause (R. 20-25), wherein he raised the federal questions here sought to be reviewed in words as follows (R. 20-21):

> *"FIRST: That Chapter 942 Florida Statutes 1955, and particularly Sections 942.01 to 942.06 Florida Statutes,* entitled the 'Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings' *and each and every section thereof, separately and severally,* and Section 618-a, of the Code of Criminal Procedure of the State of New York, and each and every section thereof, *are unconstitutional, and null and void, because: (Emphasis supplied).*
>
> • • • • •

"(5) That each of said Acts, and each and every section thereof, separately and severally, is in contravention of and violates Article Four, Section 2, and the Fourteenth Amendment to the Constitution of the United States in that same abridges the privileges and immunities of Citizens of the United States, and deprives respondent of his liberty without due process of law and denies respondent the equal protection of the laws."

On July 20, 1956, after a hearing before said Circuit Court at which no evidence was presented (R. 57-120), said Court rendered its opinion and order (9 Fla. Supp. 153-164; R. 124-136; Appendix "A") in which its passed upon the respondent's above quoted contention by holding Section 942.02 to be violative of the Fourteenth Amendment to the United States Constitution in that it abridges the privileges and immunities of citizens of the several states by impairing their right of free ingress and egress from state to state, as appears from the following quotation from said Court's opinion and order (R. 130; Appendix "A"):

"Passing for the moment, the fact that the Legislature of this State is powerless to confer upon this, or any other Court of the State of Florida, jurisdiction to issue process running beyond the limits of the State, Section 942.02 Fla. Statutes 1955 also violates the Fourteenth Amendment to the Constitution of the United States in that it abridges the privileges and immunities of citizens of the several states, since it impairs the right of free ingress and egress from state to state, which is one of the rights of national citizenship guaranteed by the Fourteenth Amendment to the Constitution of the United States. Edwards v. California, 314 US 160, 62 S. Ct. 164; In Re. Allen, supra; Commonwealth

v. Klaus, supra, and Commonwealth v. Pennsylvania, supra."

and by sustaining the respondent's motion to quash and discharge the rule to show cause in words as follows (R. 134-135; Appendix "A"):

"Upon consideration of the application of the People of The State of New York, the Court is of the opinion that said Application should be denied, and this proceeding dismissed, and therefore, it is

"CONSIDERED, ORDERED, AND ADJUDGED, as follows:

"1. That the Motion of JOSEPH O'NEILL to quash and discharge the Rule to Show Cause issued in the above-styled cause, and directed to him, be and the same is hereby granted, and said Rule to Show Cause is hereby quashed and discharged, and said JOSEPH O'NEILL is hereby discharged from custody thereunder."

In said opinion and order, said Circuit Court also held Section 942.02, Florida Statutes 1955, to be unconstitutional upon the grounds that it attempted to give the courts of Florida extra-territorial jurisdiction to issue process, and that it unconstitutionally permitted a witness to be taken into custody and delivered to an officer of the requesting state without allowing such witness to make bail. Said Court further held that said certificate and affidavit did not state sufficient facts to show that the respondent was a material and necessary witness.

On August 15, 1956, the petitioner filed its notice of ap-

peal from said order to the Supreme Court of Florida (R. 137) and thereafter duly perfected its appeal to said Supreme Court.

The petitioner duly raised in said Supreme Court the federal questions here sought to be reviewed in its assignments of error numbered 1, 2, 3 and 4, reading as follows (R. 138):

> "1. That the Court erred in granting the Motion to Quash the Rule to Show Cause in these proceedings.
>
> "2. That the Court erred in its ruling that Chapter 942.02, Florida Statutes, 1955, is unconstitutional.
>
> "3. That the Court erred in its ruling that subsection 1 of Chapter 942.02, Florida Statutes 1955, is unconstitutional, void, and of no effect insofar as the portion of this statute which confers jurisdiction upon any court of record in the State of Florida to make an order directing a witness to appear before a court in another State.
>
> "4. That the Court erred in its ruling that subsection 1 of Chapter 942.02 Florida Statutes 1955 violates the 14th Amendment to the Constitution of the United States, in that it abridges the privileges and immunities of citizens of the several states."

On January 22, 1958, the Supreme Court of Florida handed down its opinion (100 So. 2d 149-157; R. 141-154; Appendix "B") and its judgment (R. 155; Appendix "C") affirming the order appealed from. Said opinion answered the federal questions here involved by holding that said

Section 942.02 unconstitutionally conflicts with the privileges and immunities clauses of Section Two of Article IV and the Fourteenth Amendment to the United States Constitution, (1) insofar as said statute permits a witness to be taken into custody and delivered to an officer of the requesting state, and (2) insofar as it authorizes the issuance of a summons requiring a witness to attend and testify in a criminal matter in the courts of another state. *[In this connection, see the certificate of the Justices of the Supreme Court of Florida who participated in said Court's decision (R. 165-166; Appendix "E"), which certificate clearly shows that said Court's holding that said statute is unconstitutional has reference to the privileges and immunities clauses of Section Two of Article IV and the Fourteenth Amendment to the United States Constitution.]*

The said opinion did not pass upon the question of whether said statute is unconstitutional as attempting to confer upon the Courts of Florida extraterritorial jurisdiction to issue process.

The said opinion specifically declined to pass upon the question of whether the said statute is unconstitutional because it does not provide for bail for persons attached and delivered into custody of an officer of another state.

Said opinion of the Supreme Court of Florida specifically overturned the Circuit Court's holding that the certificate of the judge of the requesting state did not state sufficient facts to show that the respondent was a material and necessary witness.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI

The petitioner submits that the two above stated questions which were decided by the Supreme Court of Florida are federal questions of substance which have never been determined by this Court and that this is a special and important reason for granting the writ of certiorari within the contemplation of this Court's Rule 19(1)(a).

It appears clear that neither of said federal questions has ever been determined by this Court.

It is also clear that each of said federal questions is a question of substance and is of tremendous importance to the administration of the criminal laws of the forty-three jurisdictions (forty-two states and Puerto Rico) which have adopted the said uniform law to secure the attendance of witnesses in criminal proceedings. These forty-three jurisdictions (listed in Volume 9, Uniform Laws Annotated, 1957 edition, page 86) are utterly dependent upon the reciprocal operation of said uniform law for the authority to enforce the attendance from other states of material and necessary witnesses in criminal proceedings.

The purpose of said uniform law, as stated in *People of New York v. Parker* (N. J.), 1 A. 2d 54, 55, is as follows:

> "Obviously the object of this statute is to promote the enforcement of the criminal laws and the administration of justice in criminal proceedings in the several states."

And as was said in *In re Saperstein* (N.J.), 104 A. 2d 842, 846:

"In view of the earlier determinations of our courts on matters concerning somewhat similar statutes and the fact that the uniform act was enacted in aid of comity between states to assist the orderly and effectual administration of justice and prosecution of criminal conduct * * *."

It is fully as important for a state to have witnesses against a defendant as it is to have custody of the defendant himself. It is of no help to a state to acquire custody of a defendant by arresting him within its own borders or by extraditing him from another state and at the same time say to that state that it is completely powerless to procure vitally necessary witnesses against him from another state even though the latter state is willing, as a matter of comity, to use the processes of its courts to require such witnesses to attend court in the requesting state where the criminal proceeding is pending. Obtaining custody of a defendant is an empty victory if the state cannot obtain the witnesses with which to prosecute him.

Every one of the forty-three jurisdictions which have adopted said uniform law has a vital stake in the outcome of this case and in the determination of whether they may constitutionally continue to make witnesses available to each other for use in criminal proceedings, as a matter of comity and under the authorization of said uniform law.

The several states cannot protect their internal security against criminals unless they can procure necessary witnesses who have fled to or are otherwise domiciled in other states. Such witnesses not being charged with crime, they cannot be extradited as criminals under the federal law or under the state law. The only way that their presence can

be procured is under and by virtue of the uniform law here under consideration.

Moreover, organized crime has no conscience and it usually has a well padded bankroll. If said uniform law should be cast into the discard as unconstitutional, organized crime would not hesitate to avail itself of the hiatus in the law by shuttling essential witnesses across state lines and then thumbing its nose at the state authorities with impunity, fully aware that no conviction could ever be obtained without procuring the personal presence of such witnesses in the state wherein the criminal proceedings are pending.

It cannot be successfully denied that it is imperative that the states have the right to exchange witnesses in criminal proceedings, and said uniform law is the only method in existence whereby such exchanges may be made.

In most states a person accused of crime has the right to confront the witnesses against him face to face. It is a common law right (23 C.J.S. 360, Criminal Law, Section 999). It is secured by the Constitutions of all except a small number of the states, while in some of the other jurisdictions the right is purely statutory (14 Am. Jur. 890-891, Criminal Law, Section 178). It is therefore not legally possible in most states for the prosecution to use the deposition of an absent witness against the accused at his trial. Nor does the law of many of the states permit the use of depositions in preliminary proceedings such as grand jury investigations. Even if all of the states permitted use of depositions in grand jury investigations of crime, that would do no more than enable the states to procure an indictment; it would be of no help to the states in trying the defendant for the offense charged in the indictment. In view of the practically uni-

versal confrontation rule, the states must have available to them some such method of exercising comity between themselves as is provided by said uniform law if they are to be able to preserve their internal security against criminals.

Although we find no decision by this Court of either of the federal questions here presented, the case of *Kentucky v. Dennison*, 24 How. 66, recognized that the states have the sovereign power to provide for the internal security of each of them, and to promote concord and harmony among all of them by mutually supporting each other in bringing offenders to justice. We quote from this Court's opinion in that case as follows (text 101-102):

> *"Indeed, the necessity of this policy of mutual support, in bringing offenders to justice, without any exception as to the character and nature of the crime, seems to have been first recognized and acted on by the American Colonies;*
>
> • • • •
>
> *"And when these Colonies were about to form a still closer union by the present Constitution, but yet preserving their sovereignty, they had learned from experience the necessity of this provision for the internal safety of each of them, and to promote concord and harmony among all their members; and it is introduced in the Constitution substantially is the same words,* but substituting the word 'crime' for the words 'high misdemeanor,' and thereby showing the deliberate purpose to include every offense known to the law of the State from which the party charged had fled.
>
> "The argument on behalf of the Governor of Ohio, which insists upon excluding from this clause

new offenses created by a statute of the State, and growing out of its local institutions, and which are not admitted to be offenses in the State where the fugitive is found, nor so regarded by the general usage of civilized nations, would render the clause useless for any practical purpose. For where can the line of division be drawn with anything like certainty? Who is to mark it? The Governor of the demanding State would probably draw one line, and the Governor of the other State another. And if they differed, who is to decide between them? Under such a vague and indefinite construction, the article would not be a bond of peace and union, but a constant source of controversy and irritating discussion. *It would have been far better to omit it altogether, and to have left it to the comity of the States, and their own sense of their respective interests, than to have inserted it as conferring a right, and yet defining that right so loosely as to make it a never failing subject of dispute and ill-will.*" (Emphasis supplied).

And we point out that in *Innes v. Tobin,* 240 U. S. 127, (affirming *Ex parte Innes,* Texas, 173 S. W. 291), this Court upheld the right of the State of Texas to surrender, under a Texas statute, one charged with crime in Georgia even though the accused was not extraditable under the federal laws and even though Texas' power to enact that statute did not derive from the United States Constitution or statutes.

Since the power of a state to prosecute criminals and to preserve its internal security against them is in many instances utterly dependent upon procuring necessary witnesses from other states, we submit that the several states have just as much sovereign power to enact reciprocal legis-

lation under which witnesses in criminal proceedings may be procured from other states as Texas had to enact legislation providing for the surrender of persons charged with crime who could not be extradited under federal law. And we further submit that the privileges and immunities clauses of Section Two of Article IV of the United States Constitution and the Fourteenth Amendment thereto are no more violated by said uniform law than they were violated by the Texas statute considered in *Innes v. Tobin, supra.*

The decision of the Supreme Court of Florida is the only decision of a state court of last resort which has passed upon the constitutionality of said uniform law in the light of the privileges and immunities clauses of the United States Constitution. A denial of certiorari would mean that Florida could not make witnesses available to other states which have enacted said uniform law and, the said law being reciprocal in its operation, such a denial would also mean that Florida could not procure witnesses from other states which have enacted said uniform law. Moreover, if this Court should deny certiorari, leaving unresolved by this Court the federal questions here presented, the decision of the Supreme Court of Florida would cast a cloud over the operation of said uniform law in other states in which its constitutionality has not been ruled upon. It is not improbable that some states would follow Florida's lead, and hold said uniform law unconstitutional, while others would decline to do so and would hold said law constitutional, with resultant confusion and substantial impairment of the operation of said uniform law.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

RICHARD W. ERVIN
Attorney General of Florida

REEVES BOWEN
Assistant Attorney General of Florida

FRANK S. HOGAN
District Attorney
New York County, New York
Counsel for Petitioner.

APPENDIX "A"

Opinion and Order of Circuit Court of
Dade County, Florida

IN THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR DADE COUNTY. CRIMINAL.

NO. 1719

In the Matter of	)	
	)	
The Application of the	)	
People of the State of	)	
New York for an Order	)	
Requiring One	)	
	)	
JOSEPH C. O'NEILL	)	**OPINION AND ORDER**
	)	
to attend and testify	)	
before the Grand Jury of	)	
the County of New York,	)	
State of New York.	)	
	)	

HOLT, Circuit Judge:

This is an application by the People of the State of New York for an Order requiring Joseph C. O'Neill to attend and testify before the Grand Jury of New York County, New York, pursuant to Chapter 942, Fla. Statutes 1955, the "Uniform Law to Secure the Attendance of Witnesses from within or without a State in Criminal Proceedings," which, for the sake of brevity, will hereafter be referred to as "The Uniform Law," which was adopted in this state in 1941.

On April 23, 1956, an Assistant District Attorney in and for New York County, New York, filed in the above entitled cause a Certificate of a Judge of the Court of General Sessions of the County of New York, supported by an affidavit of an Assistant District Attorney of said County, certifying that there was then pending in said court a criminal investigation by the Fourth November 1953 Grand Jury of said County entitled "The People of the State of New York v. John Doe," and that a certain Joseph C. O'Neill, then within Dade County, Florida, was a necessary and material witness for the State of New York in said criminal proceeding being conducted by said Grand Jury, and requesting that said Joseph C. O'Neill be taken into immediate custody and delivered to an officer of the State of New York to be conveyed to New York in order to assure his attendance as a witness before said Grand Jury. Upon presentation of said Certificate, this Court issued an attachment for said Joseph C. O'Neill. and a rule directed to him to show cause why an Order should not issue to take him into immediate custody and deliver him to an officer of the State of New York to assure his attendance in New York.

Joseph C. O'Neill was forthwith seized and arrested upon said Attachment and Rule to Show Cause, and brought before this Court in custody, and through his attorney, he requested time to review said matter upon which said Attachment and Rule to Show Cause was based, and to file a response to said Rule to Show Cause. This Court fixed bail at $2500.00, and allowed him time within which to file his response to said Rule to Show Cause. Thereafter, said Joseph C. O'Neill filed his response to said Rule to Show Cause and Motion to Quash, and this matter or cause came on to be heard on June 18, 1956, upon said Certificate of said Judge of the Court of General Sessions of New York County, New

York, and said Rule to Show Cause issued thereon, and the response, and Motion to Quash same filed by, and on behalf of said Joseph C. O'Neill, who appeared in person and by counsel, the applicant being represented by Honorable Francis X. Clark, an Assistant District Attorney in and for the County of New York, assigned to the Rackets Bureau of the District Attorney's Office.

By his response to said Rule to Show Cause, said Joseph C. O'Neill objected to the entry of any Order that he be taken into immediate custody, or that he be delivered to an officer of the State of New York, upon the ground that said "Uniform Law," Sections 942.01 to 942.06 Fla. Statutes 1955) was unconstitutional and void, in that same was in contravention of certain provisions of the Constitution of the United States, and the Constitution of Florida, and that no sufficient showing had been made that he was or is a necessary, and material witness in said criminal proceeding, and other reasons, which will be noted hereinafter. Said matter was fully argued by counsel for the respective parties, and the argument was reported, transcribed, and submitted to the Court, together with briefs by counsel for the respective parties, all of which have been fully considered by the Court.

The "Uniform Law," first adopted by the National Conference of Commissioners on Uniform State Laws, in 1931, (See Note: 24 FSA 288), in point of fact is "Uniform" in name only, and in its general over-all outline, because almost every state which has adopted it, has made changes in its text. Although 25 years have elapsed since it was first proposed for adoption by the States and although it has been adopted in somewhat different form by 42 States and the Territory of Puerto Rico (See: 9 U.L.A. Supp. 33),

there appear to be only eleven (11) reported decisions, listed in the Appendix to this Opinion, in which it has been considered, construed, or passed upon in any way; and none of those eleven decisions has considered or passed upon Sub-Section (3) of Section 942.02 Fla. Statutes, which is sought to be invoked in this proceeding.

The "Uniform Law" (Sections 942.01 to 942.06 Fla. Stat. 1955) appears to provide for two methods by which a witness may be compelled to appear and testify as a witness in another State. *First,* by the issuance of a "summons * * * directing the witness to attend and testify in the Court" of the other State, as provided in Sub-Section (2) of Section 942.02; in other words, by the issuance of a witness subpoena by a court of record of this State, directed to the witness, requiring him to go to another State, and appear and testify in the Court of such other State. *Second,* by the issuance or entry of an Order, provided by Sub-Section (3) of Sec. 942.02, that the witness be taken into immediate custody and delivered to an officer of the requesting State to be taken as a prisoner to the State where his attendance is desired as a witness. The Certificate which is the basis for this application, seeks to invoke the second method; that is, it recommends the immediate seizure of O'Neill, and his immediate delivery to officers of the State of New York.

The briefs filed by counsel for the Applicant and counsel for the Respondent, have not cited a single reported case in which any Court has considered or passed upon the constitutionality of the particular sub-section of the "Uniform Law" (Sub-Section (3) of Sec. 942.02 Fla. Statutes), except In Re ALLEN (a) 1940, 49 Par. D. & C. 631, in which the Court, after fully considering the constitutionality of the Act, held it unconstitutional, and expressly held (Text 642-

644) that the Section attempting to provide for the immediate seizure of the witness and his immediate delivery to officers of the requesting State, is unconstitutional. The only other reported decision which refers to that particular Sub-Section of the Act is U. S. vs. MONJAR (Del. 1946) 154 F. 2d 954, 170 A.L. R. 327, in which the Court merely refers to said Sub-Section, and holds that it should not be invoked against the Clerk of the United States District Court for the District of Delaware.

There appear to be only three reported decisions which have considered the constitutionality of the "Uniform Law," two in New Jersey, and one in Pennsylvania. In *Re ALLEN*, supra, decided in 1940, is the earliest of the three decisions, and in a well considered, well supported decision, the court held said Act unconstitutional because: (1) It violates the Fourteenth Amendment to the Constitution of the United States, which forbids any State to make or enforce any law which abridges the privileges and immunities of citizens of the United States; (2) violates the clause in the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall deprive any person of life, liberty, or property, without due process of law; and (3) violates the Constitutional guaranty that the people shall be secure in their persons from unreasonable searches and seizures. In Re COOPER, 127 N.J.L. 312, 22 A. 2d. 532, decided in 1941, is the next case in which the constitutionality of said Act was considered, but the question does not appear to have been fully presented; nor does it appear to have been fully considered or decided, and in that case, the provision authorizing the immediate seizure of the witness, and his immediate delivery to the officers of the requesting State (Sub-Section (3) Sec. 942.02 Fla. Sta-

tutes) was not involved or considered. The third case, In Re SAPERSTEIN, 30 N. J. Super. 373, 104 A. 2d. 842, cert. den. 75 S.Ct. 110, 348 US 874, 99 L. Ed. 688, decided in 1954, primarily dealt with the question whether the "summons" or subpoena provided for by the Act (Sub-Section (2) Sec. 942.02 Fla. Statutes) authorized a subpoena duces tecum, and the provision relied upon in the case before the Court, Sub-Section (3), Sec. 942.02 Fla. Statutes, was not involved. The only point considered, so far as constitutionality of the Act was concerned, was whether it constituted a "compact" between states, in violation of the third clause of Section 10, Article I, of the Constitution of the United States, and the Court held that it did not constitute such a "compact." Thus, in the only three cases in which the constitutionality of the "Uniform Law" has been considered, it has been held unconstitutional in one, and in the other two, its constitutionality does not appear to have been carefully or thoroughly argued, considered, or decided, but, in the only case (In Re Allen, supra) in which the constitutionality of Sub-Section (3) of Sec. 942.04, Fla. Statutes, has been considered, it was held unconstitutional. In view of the fact that the constitutionality of the "Uniform Law" has been considered in only three cases during the 25 years which have passed since it was first proposed, and by the courts of only two out of the 42 States which have enacted said law (i. e., Pennsylvania and New Jersey), it can hardly be said that its constitutionality is settled. Two other cases have been cited, bearing upon the constitutionality of the Act under consideration: In Re COMMONWEALTH OF PENNSYLVANIA, 90 N.Y.S. 808, decided in 1904, and COMMONWEALTH OF MASSACHUSETTS v. KLAUS, 145 App. Div. 798, 130 N. Y. S. 713, decided in 1911. The "Uniform Law" was adopted by the National Commissioners on Uniform State Laws in 1931,

twenty years *after* the decision in the Klaus case, and twenty-seven years after the decision of the case in 90 NYS 808, both of which involved Section 618-a of the New York Code of Criminal Procedure, undoubtedly a forerunner of the "Uniform Law," but which did not contain any provision similar to sub-section (3) of Sec. 942.02 Fla. Statutes. It is also worthy of note that neither of those cases was decided by the highest court of the State of New York, and in the first (In re COMMONWEALTH OF PENNSYLVANIA, 90 N.Y.S. 808), the Court held said Act to be unconstitutional, while in the second (COMMONWEALTH v. KLAUS, 130 N.Y.S. 713), said Act was held constitutional by a divided court, with a well-considered, vigorous dissent. In conclusion, it may be said that the constitutionality of the "Uniform Law" (Sections 942.01 to 942.06 Fla. Statutes) is not settled, but appears to be in grave doubt.

In considering this case, it must be borne in mind that Joseph O'Neill is not under indictment in the State of New York, and it is not contended that he is a fugitive from justice so as to make him subject to extradition pursuant to the Uniform Interstate Extradition Law, Sections 941.01 to 941.37 Fla. Statutes 1955, or under the Federal Criminal Extradition Statute (Sections 3181 to 3195, Title 18 U.S.C.A.) expressly authorized by Section 2 of Article IV of the Constitution of the United States. It appears without question in this case that Joseph O'Neill is a citizen of Illinois, and that he resides, and has his home, and office or place of business in that state. He came into the State of Florida on or about April 23, 1956 for a few days' sojourn in connection with a convention which he was attending. He is not charged with having violated any law of the State of New York, or the State of Florida, or any other State.

It is settled beyond controversy or debate that the Courts of Florida have no jurisdiction to issue process running beyond the territorial limits of this State, and have no jurisdiction over persons, or property beyond the territorial limits of the State of Florida. "A court created within a sovereignty is necessarily limited as to its sphere of direct action on persons and things, real estate and chattels within that sovereignty." Hotchkiss vs. Martin (Fla) 52 So. 2d. 113. Process of one State has no force or validity within the territorial limits of another State, and cannot run beyond the territorial limits of the State. Passett v. Chase, 91 Fla. 522, 107 So. 689. A court created within and for a particular territory is limited in its jurisdiction to such territory, and no judicial process has any force outside such limits. Phillips v. State, 75 Fla. 93, 77 So. 673. "A warrant of arrest issued in one State may not be executed in another State, for it has no validity beyond the boundaries of the State by whose authority it was issued." *3 Fla. Jur. Arrest. p. 55.* It has been settled ever since Pennoyer v. Neff, 95 US 714, 24 L. Ed. 565, that the Legislature of a State cannot authorize process running beyond the territorial limits of the State. Under the authorities cited, it is clear that the Legislature of this State has no constitutional power to confer jurisdiction upon the Courts of this State to issue process running beyond the territorial limits of the State of Florida, and that is the effect of sub-section 1 of Section 942.02 Fla. Statutes 1955. Just as the Legislature of this State is powerless to confer jurisdiction upon this Court to issue witness subpoena or other process running into Georgia, Alabama, or any neighboring State, it is likewise powerless to confer jurisdiction upon this Court to issue witness subpoena or other process running into other States, such as New York. If a witness subpoena were issued

by this Court commanding a witness to appear before a court of the State of New York, such process would be of no force and effect as compulsory process. Insofar as Subsection 1 of Section 942.02, Fla. Statutes, 1955, attempts to confer any such power, authority, or jurisdiction upon any court of record of this State, it is unconstitutional, void, and of no effect. Passing for the moment, the fact that the Legislature of this State is powerless to confer upon this, or any other Court of the State of Florida, jurisdiction to issue process running beyond the limits of the State, Section 942.02 Fla. Statutes 1955 also violates the Fourteenth Amendment to the Constitution of the United States in that it abridges the privileges and immunities of citizens of the several states, since it impairs the right of free ingress and egress from state to state, which is one of the rights of national citizenship guaranteed by the Fourteenth Amendment to the Constitution of the United States. Edwards v. California, 314 US 160, 62 S. Ct. 164, In Re Allen, supra; Commonwealth v. Klaus, supra, and Commonwealth v. Pennsylvania, supra.

Perhaps the most serious objection to the constitutionality of the "Uniform Law (Sections 942.01 to 942.04 Fla. Statutes) is found in the provisions of Sub-Section (3) of Sec. 942.02, which attempts to authorize a court of this State to order a citizen not charged with the commission of any crime, or even suspected of having committed any crime, to "be taken into immediate custody and delivered to an officer of the requesting State" or, "in lieu of issuing subpoena or summons, order that such witness be forthwith taken into custody and delivered to an officer of the requesting State." This sub-section makes no provision for bail, and if followed literally, does not contemplate or permit

bail, but attempts to authorize any court of record to order a citizen to be arrested, seized and held without bail, and to be delivered, without bail, to an officer of the requesting State to be carried away against his will as a prisoner to another State. Neither counsel has cited any reported case holding this sub-section of the Act under consideration constitutional. This Section was merely mentioned in passing in U. S. v. Monjor (Del. 1946) 154 F. 2d 954, 170 ALR 327, with the observation that should a subpoena be issued to the Clerk of the United States Court for the District of Delaware, he should not be subjected to the provisions of that Section. In the case of In Re: ALLEN, supra, the Court held that the failure of this Section to provide for bail rendered the Act unconstitutional. The Court, in discussing this subject (Text 643-644), said:

> "The Statute under consideration with its provisions for taking a witness into custody and delivering him bodily over to authorities from a foreign jurisdiction is, in our opinion, clearly unreasonable and unwarranted. A person charged with a crime can be taken from one State to another in order that he may be punished for the crime. It is significant that the clause in the Federal Constitution which reads as follows: "A person charged in any State with Treason, Felony, or other crime, who shall flee from Justice, and be found in another State, shall on Demand of the Executive Authority of the State from which he fled, be delivered up to be removed to the State having jursidiction of the Crime;" is part of Section 2 of Article IV of the Federal Constitution, and it immediately follows and thus qualifies the opening sentence of that section which guarantees to the citizens of each State all the privileges and immunities of citizens in the several States."

"The authority for extradition is found in the Federal Constitution and the Federal Statutes passed pursuant thereto. See R. S. par. 5278, 18 U. S. C. Par. 662. Roberts v. Reilly, 116 U. S. 80 94 (1885), and Innes v. Tobin, 240 U. S 127, 131 (1916). It would seem that if it required a provision of the Federal Constitution to provide for the compulsory transfer of a person charged with a crime from one State to another, a fortiori, an Act for the compulsory transfer of an innocent person from one State to another for the purpose of giving viva voce testimony should have like express constitutional authority, and that the Act should permit the proposed witness to enter his recognizance as in extradition proceedings. A fugitive from justice or a person in this State charged with a crime in another State is allowed to enter bail unless the crime with which he is charged is punishable by death or life imprisonment; Act of April 2, 1927, P. L. 327, Sec. 16. Surely, it is not due process of law to protect the liberty of criminals and fugitives from justice to a greater degree than the liberty of honest and law-abiding citizens of this State."

The right to bail in Florida is not a mere "privilege," which may be denied in the Court's discretion. The right to bail is absolute, unless the person is charged with a capital offense, and even then, he is entitled to bail unless the proof of guilt is evident or the presumption great. Ex Parte McDaniel, 86 Fla. 145, 97 So. 317; Bozovichar v. State, (Ind.) 103 N. E. 2d 680; Section 9, Declaration of Rights of the Constitution of Florida. The right to bail under the Constitution of the United States, and other States is almost universal and unrestricted, except in capital cases where the proof of the prisoner's guilt is evident or the presumption of his guilt is great. See: Sec. 5, Bill of Rights

of the Constitution of New York: Eighth Amendment to the Constitution of the United States. "A denial of such right is a deprivation of liberty without due process of law." 3 Fla. Jur. Bail and Recognizance, p. 37-38.

Sub-section 3 of Section 942.02 Fla. Statutes, invoked by the applicant in this case, is clearly unconstitutional and void, and the application for an order to take Joseph O'Neill into immediate custody must be and is hereby denied.

Sub-Section 2 of Section 942.02 Fla. Statutes requires that this Court determine that the witness is "material and necessary." Neither the Certificate, nor the affidavit upon which it is based, set forth any *facts* from which this Court can determine that O'Neill is a "material and necessary" witness before the Grand Jury, and the showing made in that respect is no stronger than the showing made in the Application of Stamler, (NY 1952) 279 App. Div. 908, 111 NYS 2d. 313, in which the State of New Jersey sought a subpoena order to require Frank Costello to appear and testify as a witness in a criminal proceeding in that State. In that case, the Court said:

> "Section 618-a of the New York Code of Criminal Procedure contemplates, at the very least, that the Court of the demanding State shall have passed on the question whether the testimony will be material in the prosecution pending in that State. Whether a mere statement that the witness is a material witness would be sufficient without further recital of the charge and the facts upon which the finding of materiality was based, we do not need now to pass upon. At least upon the certificate produced in this case it was improper for the Judge of the Court of General Sessions to grant the

subpoena-order without any proof of the materiality of the testimony of the Order."

In State v. Blount (Ore. 1954) 200 Ore. 35, 264 P. 2d. 419, cert. den. 74 S. Ct. 711, 347, U. S. 962, 98 L.ED. 1105, the Oregon Court held that the showing of the facts required by the "Uniform Law" to show that the witness is "material and necessary", should at least be as great as the showing required in order to obtain a continuance upon the ground of the absence of a material witness, and that it must appear from a statement of the *facts* that such witness is "material and necessary", and that a mere statement to that effect is insufficient. In State v. Foquette (Nevada 1950) 67 Nev. 505, 221 P. 2d. 404, cert. den. 71 S. Ct. 799, 341 US 932, 95 L. Ed. 1361; 72 S. CT. 369, 342 US 928, 96 L.ED. 691, the Court again held that under the Act in question the facts must be stated to show that such a witness is both material and necessary. It is well settled in Florida that in order to secure a continuance upon the ground of the absence of a material witness, the applicant must state the *facts* to which such witness would testify, in order that the Court may determine from the *facts* that the testimony of the absent witness is material and necessary. Harrell v. Durrance, 9 Fla. 490; Reynolds v. Smith, 49 Fla. 217, 38 So. 903. Tested by this Rule, the certificate and the affidavit upon which this application is based fall far short of any showing that Joseph O'Neill is a "material and necessary witness" in any proceeding pending in New York. It is a safe rule that in any proceeding in which an application for the seizure of any person is sought, the application should state the *facts* upon which such application is based. Section 22 of the Declaration of Rights of the Constitution of Florida guarantees the right of the people to be secure

in their persons, houses, papers and effects against unreasonable searches and seizures, and that no warrants shall be issued but upon probable cause supported by oath and affirmation. Warrants for the arrest of any person can only be issued in this State upon oath indicating a probable violation of the law. Sec. 901.02 Fla. Statutes, 3 Fla. Jur. Arrest, pp48-49; Conrad v. Van Buren, Cir. Judge, 144 Mich. 492, 108 NW 347. Neither the affidavit, nor the certificate upon which this application is based set forth any *facts* from which it is made to appear that Joseph O'Neill is a "material and necessary witness", and in the absence of such a showing, this Court is not authorized to issue any summons, or subpoena, and the mere statement of a conclusion that he is a material or necessary witness is insufficient. Application of Stamler, supra; State v. Blount, supra; State v. Foquette, supra.

Upon consideration of the application of the People of The State of New York, the Court is of the opinion that said Application should be denied, and this proceeding dismissed, and therefore, it is

CONSIDERED, ORDERED, AND ADJUDGED, as follows:

1. That the **Motion** of JOSEPH O'NEILL **to quash** and discharge the Rule to Show Cause issued in the above-styled cause, and directed to him, be and the same is hereby granted, and said Rule to Show Cause is hereby quashed and discharged, and said JOSEPH O'NEILL is hereby discharged from custody thereunder.

2. That JOSEPH O'NEILL, and the surety upon his

bond posted pursuant to said Rule to Show Cause be, and they and each of them are hereby discharged of all liability thereunder.

3. That the attachment issued in the above styled cause for the arrest of said JOSEPH O'NEILL, described therein as Joseph C. O'Neill, be and the same is hereby quashed, and dismissed, and the application of the People of the State of New York for an Order requiring said JOSEPH O'NEILL, named and described therein as Joseph C. O'Neill, be and the same is hereby dismissed, with prejudice and at the cost of said applicant.

DONE AND ORDERED in the City of Miami, Dade County, Florida, this 20 day of July, 1956.

GEORGE E. HOLT
Circuit Judge

APPENDIX

(1) People V. Parker
(N. J. - 1936) 16 N. J. Misc. 471
1 A. 2d. 54.

(2) In Re Cooper
(N. J. - 1941) 127 N.J.L. 312
22 A. 2d. 532

(3) In Re Saperstein
(N. J. - 1954) 30 N.J. Super. 373,
104 A. 2d. 842,
Cert. Den. 75 S. Ct. 110
348 U. S. 874, 99 L. ED. 688

(4) U. S. v. Monjor
(Del. 1946)
154 F. 2d. 954.

(5) Application of Stamler
(N. Y. 1952) 279 App. Div. 908
111 NYS 2d. 313.

(6) State v. Blount
(Ore. 1954) 200 Ore. 35,
264, P. 2d. 419,
Cert. Den. 74 S. Ct. 711,
347 US 962, 98 L. ED. 1105

(7) State v. Foquette
(Nev. 1950) 67 Nev. 505,
221 P. 2d. 404,
Cert. Den. 71 S. Ct. 799,
341 U. S. 932, 95 L.ED. 1361,
72 S.Ct. 369, 342 US 928,
98 L.ED. 691

(8) Vore v. State
(Neb. 1954) 158 Neb. 222,
63N. W. 2d. 141

(9) People v. Simon
(Cal. 1951) 107 Cal. App. 2d. 105,
236 P. 2d. 855,
Cert. den. 72 S.Ct. 645,
343 US 911, 96 L.ED. 1327

(10) State ex rel Butler v. Swenson,
(Minn. 1954)
66 N. W.2d, 1

(11) In re Allen
(Pa. 1943)
49 Pa. D & C. 631.

Filed this 20th day of July, A. D. 1956 and recorded the 23rd day of July A. D. 1956, in Circuit Court Minute Book 305, Page No. 145.

E. B. LEATHERMAN
Clerk Circuit Court

By G. Boyer, Deputy Clerk

APPENDIX "B"

Opinion of Supreme Court of Florida.

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1958

IN RE: THE APPLICATION OF	**	
THE PEOPLE OF THE STATE	**	
OF NEW YORK FOR AN OR-	**	
DER REQUIRING ONE	**	
JOSEPH C. O'NEILL	**	CASE NO. 28,978
TO ATTEND AND TESTIFY BE-	**	
FORE THE GRAND JURY OF	**	
THE COUNTY OF NEW YORK,	**	
STATE OF NEW YORK.	**	

Opinion filed January 22,1958

An Appeal from the Circuit Court for Dade County, George E. Holt, Judge

Richard W. Ervin, Attorney General, Reeves Bowen, Assistant Attorney General and Frank S. Hogan, District Attorney, New York County, (New York, N. Y.) for Appellant

L. J. Cushman, for Appellee

THOMAS, J.:

On 23 April 1956 there was filed in the Circuit Court of Dade County, Florida, the certificate of Honorable Mitchell D. Schweitzer, Judge of the Court of General Sessions of the State of New York, reciting that he had read

an affidavit signed by an Assistant District Attorney of the County of New York, recommending that one Joseph C. O'Neill be taken into custody and delivered to an officer of the State of New York to assure his attendance there and that the witness, O'Neill, be brought immediately before the Florida court for hearing on the matter of extradition.

It was stated in the certificate that the District Attorney had been conducting before a grand jury an investigation of the use of funds of certain labor unions and the activities of union officials in the handling of such monies. The grand jury was undertaking to determine whether or not union officials and representatives had conspired to steal funds belonging to the unions in violation of Secs. 580 and 1290 of the Penal Law of New York.

In the certificate O'Neill was designated a material and necessary witness in the investigation. He was described as General President of the Distillery, Rectifying, Wine and Allied Workers' International Union of America, Chairman of the Executive Board, and Chairman of the Social Security Department which administers the welfare fund of the union. The grand jury purposed to learn from him about disposition of the union's funds.

According to the judge's certificate efforts to procure the attendance of O'Neill had been unsuccessful and he had refused to appear voluntarily and testify. Inasmuch as he resided in Illinois, in which no reciprocal witness statute has been enacted, the office of the District Attorney could not compel his presence.

Continuing, it was stated that the District Attorney learned that a convention of the union would be held in Miami 23 April 1956 and that under the constitution of the union the president, O'Neill, was required to be present and preside.

By the certificate O'Neill was assured of protection from arrest or service of civil and criminal process in connection with matters arising before his entrance into New York should he appear under court order.

We see no occasion to give a summary of the statements in the affidavit of the Assistant District Attorney as they seem harmonious with the ones appearing in the judge's certificate which contains sufficient information for determination of the points in controversy.

There was incorporated in the affidavit the request that the court under Sec. 618-a of the New York Code of Criminal Procedure issue the certificate we have described.

Upon the filing of the certificate in the Circuit Court of Dade County the judge ordered the sheriff to attach O'Neill and bring him forthwith before the court to show cause why an order should not immediately issue for his custody and his delivery to an officer of the State of New York. Evidently the same day the certificate was filed O'Neill was apprehended and gave bond, although there is no provision in our statute, Sec. 942.02, Florida Statutes 1955, for such a bond.

A month later O'Neill filed a response and after another month had passed a hearing was held by the circuit

judge when arguments of Assistant District Attorneys from New York and O'Neill's counsel were presented but at which no testimony was taken. Subsequently the judge, basing his opinion on the record, concluded that Sec. 942.02, supra, was unconstitutional because by it the state was given extraterritorial jurisdiction, the right of ingress and egress across the state line was impaired and the witness could be taken into custody here and delivered into custody of an officer of another state without bail. Also, the judge thought the certificate of the Judge of the Court of General Sessions of New York and the affidavit of the Assistant District Attorney did not depict a situation showing that O'Neill was a material and necessary witness.,

We dismiss the last point with the observation that it is plain to us O'Neill is a material and necessary witness in the investigation of the misuse of funds of the union. By the terms of the act, the certificate of the judge must be taken as "prima facie evidence of all the facts stated therein." It may be logically deduced that because of the positions held by O'Neill he is familiar with the funds of the organization if, indeed, he does not supervise or control them, and we think that in an investigation of the administration of those funds he would prove a material and necessary witness.

It is stated in the brief of the Attorney General that the "appellant" filed a notice of appeal and filed "its" assignments of error and "its" directions to the clerk.

Upon an examination of the record, we find that the notice of appeal was filed by "THE APPLICANT, the People of the State of New York" and that it, the assign-

ments of error and the directions to the clerk, carried the names of the District Attorney of New York County, the Attorney General of Florida, the State Attorney of the Eleventh Judicial Circuit and an Assistant State Attorney but were signed only by the Assistant State Attorney. On the notice of appeal these officers were described as attorneys for "applicant" and on the assignments of error and directions to the clerk, as attorneys for "appellant".

Soon after the appeal was lodged here the attorney for Joseph C. O'Neill moved to dismiss it, and the members of the court sitting at the time deferred a ruling until hearing of the cause on the merits.

We have now reconsidered the motion and have concluded we should proceed to a determination of the dispute on the merits, that is, the adjudication of the validity of Sec. 942.02, supra. The motion was based on the ground that this court had no jurisdiction because the order attempted to be reviewed was entered in a criminal proceeding and the state had no right to appeal except from orders specified in Sec. 924.07, Florida Statutes 1955, of which the order of the circuit judge was not one, and further that the People of the State of New York had no right of appeal. The Attorney General countered on the ground that the case was a civil proceeding and asked this court to consider the appeal a petition for certiorari, under Sec. 59.45, Florida Statutes 1955, if it appeared that the appeal had been improvidently taken.

We agree with the Attorney General that the proceeding is not criminal and that appeal was the proper method of review as, by Sec. 5 of Art. V of the Constitution, this

court had "appellate jurisdiction in all cases at law * * * originating in Circuit Courts * * *." The case originated in the circuit court and the appeal was filed before the effective date of the amendment of Art. V adopted in November 1956.

The procedure followed by the Attorney General is rather unusual because the record does not show any participation by him until the circuit judge had ruled. His name first appears on the notice of appeal. But the State of New York, in our opinion, had the right to appeal as O'Neill would have had if the judgment had been unfavorable to him. The appeal became effective when the notice was filed by the District Attorney of New York County. The introduction of the Attorney General into the controversy was somewhat unorthodox but in view of the mandate in Sec. 22 of Art. IV of the Constitution that he "perform such other legal duties as may be prescribed by law" and the requirement of Sec. 16.01, Florida Statutes 1955, that he "appear in and attend to in behalf of the state, all suits or prosecutions, civil or criminal, or in equity, in which the state may be a party, or in any wise interested * * *" we will consider his entrance via the notice of appeal an effort to present the interest of the state in the preservation of the statute. This concern of the state in maintaining the validity of the law comes from the law's reciprocal nature. If the act is held unconstitutional, then, of course, the attendance here of witnesses residing in states having such a uniform act cannot be accomplished.

The act is known as the " 'uniform law to secure the attendance of witnesses from within or without a state in criminal proceedings,' " Sec. 942.06, Florida Statutes 1955, and F.S.A., and is "only applicable to such state as shall

enact reciprocal powers to this state relative to the matter of securing attendance of witnesses'' as provided in it. Sec. 942.05, Florida Statutes 1955. It was enacted in New York, Code of Criminal Procedure 618-a, supra.

We return now to the procedure outlined. If it is recommended in the certificate that the witness be taken into immediate custody and delivered to an officer of the state making the request, the judge may, instead of notification of the hearing, order the witness brought before him at once. Such a recommendation was made in this case and such an order was initially entered. It is provided in the act that if at the hearing the custody and delivery appear to the resident judge 'desirable', he may order the witness placed in custody and delivered to an officer of the state making the request.

Evidently The People of the State of New York intended by the certificate of the judge to coerce the attendance of O'Neill by one process or the other but preferred to have the witness taken into custody. When the circuit judge in Dade County entertained the certificate, two courses were available. He could have notified the prospective witness of a hearing to determine whether or not the witness should be subpoenaed to testify before the grand jury in New York. On the other hand, in view of the recommendation that the witness be taken into custody, the judge could have directed that the witness be immediately brought before him and then, if the judge was "satisfied of the desirability" that the witness should be placed in custody and delivered to an officer of the State of New York, he could have followed that procedure instead of issuing a subpoena.

The latter course seems to have been first chosen by the circuit judge, but upon hearing he decided not to put O'Neill in custody or place him under summons because of his conviction that the whole act was invalid.

In the circumstances it seems to be our obligation to decide the constitutionality of Sec. 942.02, supra, whether the procedure be to seize and deliver a witness or to place him under subpoena. We will discuss the two aspects in that order.

Certain salient facts should be remembered in judging the merits of the act as it would operate on O'Neill. He is not charged with crime. On the contrary, it is stated in the judge's certificate that the laws of New York would guarantee O'Neill, if taken there pursuant to this proceeding, protection from arrest and the service of criminal process. Parenthetically, this assurance was given in the certificate but it is extremely doubtful if the act itself provides for such a safeguard, except in the case where a summons is issued as distinguished from seizure and delivery of the witness.

Although the uniform law was adopted by The National Conference of Commissioners on Uniform State Laws more than a quarter-century ago, and, incidentally, enacted by this State in 1941, there is a dearth of judicial decision on its operation and validity.

It appears from the opinion of the circuit judge and the brief filed by the appellee that but one court has passed directly upon the provisions of the act attempting to authorize the summary procedure, namely, a District and County Court of Pennsylvania in In Re Allen, 49 Pa. D & C 631.

The court seems to have primarily considered the title of the act under attack, but it did declare the provisions for seizure of a witness and his delivery to the officer of a foreign state invalid because they violated Sec. 2 of Art. IV and the privileges and immunities provision of the Fourteenth Amendment of the Federal Constitution. The Constitutionality of the uniform act was considered in In Re Cooper, 127 N.J.L. 312, 22 A.2d 532, and in In Re Saperstein, 30 N.J. Super. 373, 104 A.2d 842, but in neither of these was the validity of the particular provisions for seizure and delivery of a witness specifically determined. In the former it was contended that the title of the act was not sufficient to make a witness for a defendant subject to its provisions with reference to the issuance of subpoenas. It is true that the provisions for seizure of a witness were assailed but clearly no attempt to invoke them had been made. In the latter decision the points presented were not the same as those we are considering.

By the Fourteenth Amendment of the Constitution of the United States the states are enjoined from making or enforcing "any law which shall abridge the privileges or immunities of citizens of the United States * * *." It also contains the guarantee that a state shall not deprive a person of liberty "without due process of law." And in the first paragraph of Sec. 2 of Art. IV of the Constitution is incorporated the guarantee that also seems immediately involved in the question whether or not a person who is not charged with crime of any sort may be restrained of his freedom because he is needed elsewhere as a witness in an investigation by a grand jury. Not only are the privileges and immunities of citizens of the United States placed beyond the power of the state to impair but citizens of each

state are vouchsafed the privileges and immunities of the citizens of all the states. The following paragraph of Sec. 2 of Art. IV gives emphasis to the preceding one and forms an exception to it for such privileges and immunities are not guaranteed to the person charged with "Treason, Felony, or other Crime" who flees from justice. The state to which he flees must deliver him up "on Demand of the executive Authority of the State from which he fled * * *."

We agree with the circuit judge that the right of O'Neill to ingress and egress would be impaired if not destroyed if the circuit judge were to order his seizure, as was 'recommended'. He would no longer have been allowed freely to pass from the State of Florida to another state but would have been taken to New York whether or not he wished to go there and he would have been prevented from returning to his home state of Illinois although it is quite clear that he came to this state for a visit of but a few days to attend a convention.

We think the provisions of the Fourteenth Amendment forbade the passage by the legislature of Florida of a law which would so interfere with the movement of a citizen of the United States who as a citizen of Illinois was privileged to move freely from his state to Florida and back. This privilege would have been nullified, of course, had he become a fugitive from justice which is not the case.

In Twining v. New Jersey, 211 U.S. 78, 29 S.Ct. 14, 53 L. Ed. 97, it was written: "Privileges and immunities of citizens of the United States, on the other hand, are only such as arise out of the nature and essential character of the national government, or are specifically granted or

secured to all citizens or persons by the Constitution of the United States. Slaughter-House Cases, supra, p. 79; Re Kemmler, 136 U.S. 436, 448, 34 L.ed. 519, 524, 10 Sup. Ct. Rep. 930; Duncan v. Missouri, 152 U. S. 377, 382, 38 L.ed. 485, 487, 14 Supt. Ct. Rep. 570. Thus, among the rights and privileges of national citizenship recognized by this court are the right to pass freely from state to state (Crandall v. Nevada, 6 Wall. 35, 18 L.ed. 745); * * *."

We think that operation of the statute in question would constitute a definite interference with the right of a citizen of the state and of the United States to move freely from one state to another, and we think of no better illustration than what would have occurred in this case had the circuit judge accepted the 'recommendation' and found it 'desirable' to send O'Neill to New York in custody. A Citizen of Illinois, comes to Florida for a brief visit; he is haled into court and confronted with an order placing him in custody of an officer who will conduct him to New York. His privilege of staying, or returning to his home in Illinois, or of going elsewhere, is brought to an end. It is difficult to imagine a harsher infringement of the right a citizen has to go from place to place which is a privilege, according to the expressions of the Supreme Court of the United States, secured to him under the Fourteenth Amendment.

O'Neill is entitled under Sec. 2 of Art. IV, supra, to all the privileges and immunities of all the citizens of all the other states so long as he has not committed crime for which he could be extradited. The power to remove him in this isolated situation is found in that section. The courts have held that this kind of extradition depends on the Constitu-

tion of the United States, People v. Hiatt, 172 N.Y. 176, 64 N.E. 825, and not on comity, courtesy or contract. Ex parte Thompson, 85 N.J. Eq. 221, 96 A.102.

We think the matter is purely one of conflict with the Federal Constitution; that the act violates the constitution, and consequently cannot be upheld.

Inasmuch as the circuit judge apparently could have put the witness under subpoena if he concluded against the "desirability" of placing him in custody and could have bound the witness to appear, or be held in contempt, and since the judge held the whole act unconstitutional and discharged O'Neill, we decide, too, the question of the validity of the law as it would be applied in the other instance.

It was the view of the circuit judge that the courts of this state were without power to issue process effective beyond the borders of the state. This general rule we understand is true. Passett v. Chase, 91 Fla. 522, 107 So. 689. Nor can civil process operate beyond the limits of the state so as to form a basis for a money judgment against one residing without although he has been made a party to the litigation by constructive service. Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565.

Because we believe, after careful study, that this feature of the law is unconstitutional, for the reasons we have given, we find no occasion to discuss the question whether or not it violates Secs. 9 and 12 of the Declaration of Rights of the Constitution of Florida and the Eighth and Fourteenth Amendments of the Constitution of the United States

because no bail is provided for persons attached and delivered into custody of an officer of another state.

We ask the rhetorical question: How, then can a Florida court enforce an order to appear before a court of another state when the operation of the order clearly extends beyond state limits? While any person is within the boundaries of this state he is subject to orders entered against him by courts properly exercising their jurisdiction, but it would be inconsistent with the decisions cited to hold that such a court could command a witness to appear in New York, send him on his way, then, if the witness did not appear in New York, punish him here for his failure there "in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state." It is not clear just what court would administer the punishment in the event of default because that part of the act provides that "he shall be punished" in the manner described. Conceivably his failure would be contemptuous of both courts. If the Florida court attempted to inflict punishment, it would be for failure to comply in New York; if the New York court undertook to inflict punishment, it would be for failure to obey a summons set in motion in Florida. Either way the Florida process would be operating extra-territorially.

The Attorney General concedes in his brief that the Supreme Court of the United States has held that among the privileges of American citizenship guaranteed by the Fourteenth Amendment is the right to pass freely from state to state, citing Twining v. New Jersey, supra. He takes the position that Sec. 2 of Art. IV has no application to the facts of this case because, as we understand it, the

statute, Sec. 942.02, does not discriminate between the citizens of Florida and the citizens of any other state. This would mean that O'Neill, a sojourner from Illinois, could be summarily put in custody or placed under subpoena, because any citizen of Florida could be treated the same way. To extend this argument the law would be valid because in those states that have adopted it any person could be placed in custody or put under subpoena, to coerce his appearance as a witness in any other state that had adopted the law.

This might be an answer to a charge of discrimination but it does not follow that if a law is invalid for some reason it should nevertheless be held good because, bad as it is, it affects all persons the same.

As we interpret the Fourteenth Amendment, the citizens of Florida and New York which have adopted the uniform law, may, as citizens of the United States, go where they please, and so may the citizens of Illinois and other states that have not enacted it. If, aside from the question now of discrimination, a citizen of a state having no such law, Illinois, travels to a state having it, Florida, and there is made subject to the law because another state, New York, thinks his presence there is 'desirable', it cannot be true that the right of all the citizens of all the states to move among them has not been impaired.

The Attorney General quotes liberally from the opinion in Commonwealth of Massachusetts v. Klaus, 130 N.Y.S. 713, decided by the Appellate Division of the Supreme Court of New York, and italicizes a statement in the opinion of that court that it was conceded in the brief "that the

right of free ingress and egress was never intended to enable a citizen of the United States to interfere with the orderly administration of justice within the territorial boundaries of the state" and that a citizen when "within the boundaries of a state" is amenable to the constitution and laws of that state and that the privileges and immunities clause affords him only protection against unjust discrimination. This concession, said the court, was a complete answer to the charge that a law, similar to the one before us, was unconstitutional. So this decision helps us little.

We are not able so easily to decide the matter before us for we do not think that Sec. 2 of Art. IV read with the pertinent part of the Fourteenth Amendment justifies the view that no rights are abridged if no discrimination is practiced.

The Attorney General argues that "[n]o power was delegated * * * to the United States to require free ingress and egress when to do so would defeat one of the primary purposes for which the state governments were instituted, viz., the protection of the people from *criminals.*" (Italics ours.) Nor does the Constitution prohibit the states from impairing the right of free ingress and egress to the extent required to protect themselves against *criminals.*

We do not find in the provisions of the law a basis for the position. The act refers to prosecutions and grand jury investigations but we have ascertained nothing in it with reference to restricting such testimony to use by the state in either. The procedure is inaugurated by a certificate of a judge of record of the requesting state that the person sought to be extradited "is a material witness *in*

such prosecution, or * * * investigation." We have supplied the italics. Furthermore, the preceding section, Sec. 942.01, Florida Statutes 1955, titled "Definitions" contains the following: "'Witness'—as used in this chapter [942], shall include a person whose testimony is desired *in* any proceeding or investigation by a grand jury or *in* a criminal action, prosecution or proceeding held by the prosecution *or the defense.*" (Italics ours.) So, evidently the procedure would be available to a defendant as well as the prosecution.

We realize that the right of ingress and egress is not absolute, for instance, the Fourteenth Amendment does not limit exercise by the state of the police power to protect the health, morals and general welfare of the people, Butchers' Union S.H. and L.S.L. Co. v. Crescent City L.S.L. and S. H. Co., 111 U.S. 746, 28 L. Ed. 585, 4 S. Ct. 652. But we do not discern in the present state of facts any of the elements of an exception.

The Attorney General concedes that circumstances might exist under which bodily delivery of a witness would be unreasonable and that "it was never intended to authorize the delivery of a witness * * * where the circumstances are such that it would be unreasonable to do so * * *." This statement is followed by the remark: "when the statute is thusly construed there is nothing unreasonable about it." In this connection we refer, again, to the procedure. If the judge of the demanding state certifies the 'desirability' of bodily delivery, it shall be prima facie evidence of the 'desirability' and the judge here may, if satisfied with the 'desirability', have the witness taken into custody. We cannot decide the constitutionality or unconstitutionality of the act under attack by simply saying that if the cir-

cumstances are reasonable there is nothing unreasonable about the act.

After a careful study of both features of the law, we are convinced that it is unconstitutional and that the circuit judge ruled correctly when he held it so.

Affirmed.

TERRELL, C. J., HOBSON, THORNAL and O'CONNELL, JJ., concur

APPENDIX "C"

Judgment of Supreme Court of Florida.

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM A. D. 1958

WEDNESDAY, JANUARY 22, A. D. 1958

IN RE: THE APPLICATION OF **
THE PEOPLE OF THE STATE **
OF NEW YORK FOR AN ORDER **
REQUIRING **
JOSEPH C. O'NEILL **
TO ATTEND AND TESTIFY BE- **
FORE THE GRAND JURY OF **
THE COUNTY OF NEW YORK, **
STATE OF NEW YORK **

This cause having heretofore been submitted to the Court upon the transcript of the order herein, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said order; it is, therefore, considered, ordered and decreed by the Court that the said order of the Circuit Court be and the same is hereby affirmed; it is further ordered by the Court that the Appellee do have and recover of and from the Appellant his costs by him in this behalf expended, except the $12.00 filing fee which has been paid by the Appellant, and that all costs shall be taxed in the Court in which the appeal was entered, all of which is ordered to be certified to the Court below.

The Opinion of the Court in this cause prepared by Mr. Justice THOMAS was this day ordered to be filed.

APPENDIX "D"

SECTIONS 941.01 THROUGH 941.06, FLORIDA STATUTES, 1955

942.01 *Definitions.*—"Witness"—as used in this chapter shall include a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution or proceeding held by the prosecution or the defense.

The word "state" shall include any territory of the United States and District of Columbia.

The word "summons" shall include a subpoena, order or other notice requiring the appearance of a witness.

942.02 *Summoning witness in this state to testify in another state.*—

(1) If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this state certifies under the seal of such court that there is a criminal prosecution pending in such court, or that a grand jury investigation has commenced or is about to commence, that a person being within this state is a material witness in such prosecution, or grand jury investigation, and that his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which such person is, such judge shall fix a time and place for a hearing, and shall make an order directing the witness to appear at a time and place certain for the hearing. The witness shall at all times be entitled to counsel.

(2) If at a hearing the judge determines that the

witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or a grand jury investigation in the other state, and that the laws of the state in which the prosecution is pending, or grand jury investigation has commenced or is about to commence (and of any other state through which the witness may be required to pass by ordinary course of travel), will give to him protection from arrest and the service of civil and criminal process, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending, or where a grand jury investigation has commenced or is about to commence at a time and place specified in the summons. In any such hearing the certificate shall be prima facie evidence of all the facts stated therein.

(3) If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, such judge may, in lieu of notification of the hearing, direct that such witness be forthwith brought before him for said hearing; and the judge at the hearing being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be prima facie proof of such desirability may, in lieu of issuing subpoena or summons, order that said witness be forthwith taken in custody and delivered to an officer of the requesting state.

(4) If the witness, who is summoned as above provided, after being paid or tendered by some properly authorized person the sum of ten cents a mile for each mile by

the ordinary traveled route to and from the court where the prosecution is pending and five dollars for each day, that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

942.03 *Witness from another state summoned to testify in this state.*—

(1) If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. Said certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

(2) If the witness is summoned to attend and testify in this state he shall be tendered the sum of ten cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending, and five dollars for each day that he is required to travel and attend as a witness. A witness who has appeared in accord-

ance with the provisions of the summons shall not be required to remain within this state a longer period of time than the period mentioned in the certificate, unless otherwise ordered by the court. If such witness, after coming into this state, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

942.04 *Exemption from arrest and service of process.*— (1) If a person comes into this state in obedience to a summons directing him to attend and testify in this state he shall not while in this state pursuant to such summons be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

(2) If a person passes through this state while going to another state in obedience to a summons to attend and testify in that state or while returning therefrom, he shall not while so passing through this state be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

942.05 *Uniformity of interpretation.*—This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it, and shall be only applicable to such state as shall enact reciprocal powers to this state relative to the matter of securing attendance of witnesses as herein provided.

942.06 *Short title.*—This chapter may be cited as "uniform law to secure the attendance of witnesses from within or without a state in criminal proceedings."

APPENDIX "E"

CERTIFICATE OF JUSTICES OF SUPREME COURT OF FLORIDA

IN THE SUPREME COURT OF FLORIDA

IN RE: THE APPLICATION OF THE PEOPLE OF THE STATE OF NEW YORK FOR AN ORDER REQUIRING ONE JOSEPH C. O'NEILL TO ATTEND AND TESTIFY BEFORE THE GRAND JURY OF THE COUNTY OF NEW YORK, STATE OF NEW YORK.

CASE NO. 28,978

CERTIFICATE

We, the undersigned Justices of the Supreme Court of Florida, being all of the Justices who participated in the decision of the above styled case, hereby certify as follows:

In the concluding paragraph of our opinion in this case, we held as follows:

> "After a careful study of both features of the law, we are convinced that it is unconstitutional • • •"

The law referred to in said quoted portion of our opinion was Section 942.02, Florida Statutes 1955.

The two features of said law referred to in said quoted matter were (1) the feature of said law which authorizes taking a witness into custody and delivering him to an officer of the requesting state; and (2) the feature of said law which authorizes the issuance of a summons requiring the attendance of a witness in the requesting state.

Our holding in said quoted part of our opinion that said law is unconstitutional as to both of said features had reference to the privileges and immunities clause of Section Two of Article Four of the United States Constitution and to the privileges and immunities clause of the Fourteenth Amendment to said Constitution, and our intention in making said holding was that, as to each of said features of said law, said law is unconstitutional because it conflicts with both of said privileges and immunities clauses of the United States Constitution.

This the 25th day of March, 1958.

GLENN TERRELL
Chief Justice

ELWYN THOMAS
Justice

T. FRANK HOBSON
Justice

CAMPBELL THORNAL
Justice

STEPHEN O'CONNELL
Justice

ATTEST:

GUYTE McCORD
Clerk Supreme Court
of Florida

(SEAL)